Petition

FILED
MAR 1 1982
ALEXANDER L. STEVAS,
CLERK

81-1633
No.

IN THE

Supreme Court of the United States

October Term, 1981

THE GAP STORES, INC.,

Petitioner,

against

SAILOR MUSIC, WOW AND FLUTTER MUSIC, QUACKENBUSH MUSIC, LTD., WB MUSIC CORP., JOBETE MUSIC CO., INC., BLACK BULL MUSIC, INC., and GLADYS MUSIC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT G. SUGARMAN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Attorney for Petitioner

LAUREN W. FIELD
WEIL, GOTSHAL & MANGES
Of Counsel

Questions Presented

1. Did the courts below err as a matter of both fact and law in failing to apply the clear and unambiguous language of Section 110(5) of the Copyright Act, 17 U.S.C. § 110(5), and thereby hold that the playing of music over radio receiving equipment of a kind commonly used in the home, without further transmission, is within the scope of the exemption from copyright infringement liability set forth in the statute?

2. Does the physical size of a commercial establishment, a factor nowhere mentioned in Section 110(5) of the Copyright Act, 17 U.S.C. § 110(5), determine whether that establishment's playing of music over radio receiving equipment of a kind commonly used in the home falls within the scope of the exemption from copyright infringement liability set forth therein?

3. Does the willingness of a background music supplier to serve a commercial establishment, a factor nowhere mentioned in Section 110(5) of the Copyright Act, 17 U.S.C. § 110(5), eliminate the availability of the exemption afforded therein to that establishment?

4. Is the injunction issued below, prohibiting "any public performances by means of radio broadcasts over loudspeakers which would infringe plaintiffs' copyrighted musical compositions," so vague as to violate Rule 65(d) of the Federal Rules of Civil Procedure?

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Opinions Below	2
Jurisdiction	2
Statute at Issue	2
Statement of the Case	3
Reasons for Granting the Writ	7
I. This Case Has an Impact Which Reaches Far Beyond the Parties to the Case	7
II. Unless Reviewed by This Court, the Second Circuit's Opinion Is Effectively the Law of the Land	10
III. This Court Has Historically Concerned Itself With This Issue	12
IV. The Decision Below Is Erroneous	13
Conclusion	20
Appendix:	
Judgment of the United States Court of Appeals for the Second Circuit, Entered November 30, 1981	1a
Opinion of the United States Court of Appeals for the Second Circuit, Filed December 15, 1981	5a
Errata Page	10a
Judgment of the United States District Court for the Southern District of New York, Entered June 26, 1981	11a
Letter Dated May 11, 1981	13a
Opinion of the United States District Court for the Southern District of New York, Dated February 3, 1981	16a

TABLE OF AUTHORITIES

PAGE

Cases:

Broadcast Music, Inc. v. United States Shoe Corp., No. 79-1936 (C.D. Cal., Dec. 22, 1980), *appeal docketed*, No. 81-5162 (9th Cir., Feb. 10, 1981) 11

Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931) 12

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975) 7, 12, 14

United States v. Oregon, 366 U.S. 643 (1966) 14

Statutes:

17 U.S.C. § 101 *et seq.* ..... *passim*

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1338(a) 4

Legislative Materials:

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) 5, 12

H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. (1976) 5

H.R. Rep. No. 2237, 89th Cong., 2d Sess. (1966) 19

H.R. 11947, 88th Cong., 2d Sess. § 13(2) (1964), House Comm. Print, 89th Cong., 1st Sess. *Copyright Law Revision: Part 5—1964 Revision Bill With Discussions and Comments* (1965) 17

Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcommittee No. 3 of House of Representatives Committee on the Judiciary, 89th Cong., 1st Sess. (1965) 18

House Comm. Print, 89th Cong., 1st Sess. *Copyright Law Revision: Part 5—1964 Revision Bill With Discussion and Comments* (1965) 17

No.

IN THE

Supreme Court of the United States

October Term, 1981

THE GAP STORES, INC.,

Petitioner,

against

SAILOR MUSIC, WOW AND FLUTTER MUSIC, QUACKENBUSH MUSIC, LTD., WB MUSIC CORP., JOBETE MUSIC CO., INC., BLACK BULL MUSIC, INC., and GLADYS MUSIC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The Gap Stores, Inc. (hereinafter "The Gap" or "Gap"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 30, 1981.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, No. 81-7543 (decided Nov. 30, 1981 and filed Dec. 15, 1981), and the opinion of the United States District Court, Southern District of New York, reported at 516 F. Supp. 923 (S.D.N.Y. 1981), are reproduced in the Appendix hereto.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 30, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statute at Issue

17 U.S.C. § 106(4):

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) . . .
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) . . .

17 U.S.C. § 110(5):

> Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) . . .

(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public;

(6) . . .

Statement of the Case

The significance of this case is established out of the mouths of the respondents herein (hereinafter "plaintiffs"), whose counsel, in a memorandum in support of their motion for publication of the opinion of the court of appeals, stated:

> The issue decided by the Court is not merely of importance to the parties involved. It affects the rights of all copyright owners of music, not just plaintiffs-appellees. And, it is of great significance to all of the thousands of establishments in the nation which use radio broadcasts over loudspeakers, not just to the Gap . . . .
>
> We believe the Court's statement would be helpful to copyright owners and their representatives, and to establishments using radio-over-speakers, by clarifying the provisions of the new Copyright Law.

This is a test case involving an attempt by the American Society of Composers, Authors and Publishers ("ASCAP"), of which plaintiffs are members, to broaden the scope of the Copyright Act of 1976, 17 U.S.C. § 101

et seq. ("the Act" or "the Copyright Act"), in order to collect multiple royalties for music played in radio broadcasts.* Not content with the approximately $30 million it annually collects in royalties from radio stations, ASCAP is seeking to collect an additional fee from commercial establishments which do no more than play music broadcast by the radio stations which have already paid these substantial license fees. Plaintiffs, all publishers of copyrighted musical compositions, allege that The Gap infringed their copyrights when the compositions were played in radio broadcasts received on radios in Gap stores. The Gap submits that the playing of radios in its stores is expressly exempted from copyright infringement liability by Section 110(5) of the Act, 17 U.S.C. § 110(5).

The Gap operates a chain of clothing stores specializing in "jeans" and other casual sportswear. The Gap stores merely play radio broadcasts over a basic receiver to speaker setup for the enjoyment of Gap employees and customers; commercials are not edited out, nor is material added by means of a public address system, nor are records or tapes played. There is no augmentation by amplifiers or transmitters. This appeal concerns The Gap store located at 354 Sixth Avenue in Greenwich Village, New York (the "Greenwich Village store").

The Greenwich Village store has 2,769 square feet. It is equipped with a receiver and four speakers which were designed for, and are commonly used in, private homes. This equipment was not specially ordered for The Gap,

* As a civil action arising under the Copyright Act, the district court had jurisdiction of the case pursuant to 28 U.S.C. § 1338(a).

but came from the regular stock of a chain of hi-fi retail stores selling to the general consumer trade. This equipment is not of commercial or professional quality. Indeed, it does not even approach the quality of more sophisticated equipment used in private homes.

The Gap's performances of music are exempt from copyright liability under the express terms of the Copyright Act because: (1) the equipment used by The Gap is of a kind commonly used in private homes; (2) there is no charge made to hear the music; and (3) there is no further transmission to the public. Nonetheless, both courts below ignored the clear language of the statute and denied The Gap an exemption, based on legislative history which is both inconsistent with the clear and unambiguous statutory language and internally inconsistent. Specifically, they relied on language in the House Report* to the effect that the exemption should apply only to a "small commercial establishment" and on language in the Conference Committee Report** to the effect that the exemption should apply only to stores which are not "of sufficient size to justify, as a practical matter, a subscription to a commercial background music service." Neither the "small commercial establishment" test nor the "commercial background music" test appears in the statute.

On the basis of this legislative history, the district court granted plaintiffs' motion for summary judgment. (Appendix (hereinafter "—a") 16a.) In a judgment entered

* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 87 (1976).

** H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. 75 (1976).

June 26, 1981, The Gap was "enjoined from rendering any public performances by means of radio broadcasts over loudspeakers which would infringe plaintiffs' copyrighted musical compositions." (11a.) The United States Court of Appeals for the Second Circuit affirmed in a judgment entered on November 30, 1981 (1a) and a per curiam opinion filed on December 15, 1981 (5a).

The Gap submits that the courts below impermissibly broadened the scope of the Copyright Act by failing to decide this case on the basis of the clear and unambiguous language of the Act, and by relying instead on portions of the legislative history which are both inconsistent with the statutory language and contradicted by other portions thereof. Had the actual language of the statute been followed, The Gap would have been entitled to summary judgment.*

---

* The district judge held that there was a question of fact respecting whether the equipment used by The Gap was of the kind commonly used in private homes. (20a-21a.) In light of the undisputed evidence on this point, this finding was clearly erroneous. In any event, at the very least, the case should be remanded for a decision on this issue.

Reasons for Granting the Writ

I. This Case Has an Impact Which Reaches Far Beyond the Parties to the Case.

The court below has not merely decided that The Gap has infringed the copyrights of the seven plaintiffs. Effectively, it has decided that The Gap *and thousands of other establishments* must pay license fees to ASCAP and to the other music licensing organizations.

As will be demonstrated in Point IV below, Congress enacted a broad exemption in the Copyright Act for the use of music played on the radio. But, as interpreted by the Second Circuit, that exemption is not available in any meaningful sense to many establishments. Pursuant to that court's opinion, any establishment which is larger than the 620 square feet of the store in *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151 (1975), or which could be served by a background music supplier would not qualify for the statutory exemption. This sweeping rule would require innumerable establishments to pay license fees which they would not have to pay had the courts below based their decisions on the actual language of Section 110(5). The background music criterion is particularly pernicious because suppliers of those services are willing to serve virtually anyone who can be induced to pay for their services.* The exemption thus becomes meaningless.

The National Retail Merchants Association ("NRMA"), recognizing the significant problems which would result

* The "evidence" relied on by the district court to establish that The Gap could be serviced by background music suppliers came from the self-serving affidavits of those suppliers. (*See* 21a.)

from the district court opinion, filed a brief *amicus* in the court of appeals. NRMA is a voluntary trade association among whose 3500 members throughout the country are many small and medium sized merchants. In urging reversal of the decision of the district court, NRMA observed:

> . . . NRMA is particularly concerned because the decision below is vague, undefined, imprecise and open to a multitude of interpretations. As a consequence it will be unable to provide its members with any meaningful guidelines on the availability of the statutory exemption. . . .
>
> * * *
>
> . . . In short, if the decision below means what it says, liability rests not on the statutory standard of the type of equipment used but on the financial size or dimensions of the establishment, whether it is a chain, its profitability or whether it has been or may be at some time in the future solicited by a background music supplier. None of these factors are contained in the statute and none is subject to facile measurement. Thus, retailers will not be able to determine whether they must take a license or are exempt.[*]

* NRMA's inability to counsel its members was dramatically demonstrated in its brief by reference to five kinds of retail establishments using home receiving equipment and speakers to play the radio, without charge, for the enjoyment of their customers and employees. Store A is a 750 square foot jewelry store with annual sales of $5 million and four speakers recessed in the ceiling with hidden wires which has been contacted by a background music service; Store B is a chain of four stores ranging in size from 500 to 1250 square feet with the same speaker system as A and annual aggregate sales of $5 million which will soon be contacted by a background music service. Store C is a 10,000 square foot automobile repair shop with a speaker in each of its four corners, visible wiring, and less than $100,000 in annual revenue. Store D is a 2,000 square foot clothing store with two speakers and hidden wires. Store E is a 100 unit chain of fast

(footnote continued on next page)

The adverse impact of this result on the members of NRMA and others similarly situated is manifest. The decision will, if not corrected, serve as a carte blanche invitation to ASCAP, BMI and SESAC to comb the countryside in search of revenues to which they are not entitled. They would be at liberty to embark on a program of demanding 'protection'—a license fee from (i) any establishment with a public area larger than 600 square feet (the size in *Aiken*), (ii) any chain of stores (whether *three* . . . or three hundred), (iii) any store with a substantial volume of sales or (iv) any store that has been or may be solicited for subscription to the Muzak-type services if the store plays a radio in its establishment.

Such a scenario of unbridled and unfettered demands will, in all probability, not be tested again by litigation. It is hard indeed to imagine that other retailers will, as a matter of principle, go to the trouble of engaging counsel to contest the claim or provide guidance. Moreover, given the statutory damages set forth in 17 U.S.C. § 504(c), such a small merchant would be running the risk of a substantial dollar penalty, based upon the decision below. Clearly such a harsh result was not intended by Congress or by the District Court. However, such dire consequences are neither imaginary nor conjectural. Given this potential source of vast amounts of revenue, ASCAP and the other licensors, given their fiduciary duties to their copyright-owner members, have every economic in-

---

food stores with an aggregate dollar volume of less than $1 million, which uses the best available table-top type radio with self-contained speakers and has been contacted by a background music service. As NRMA points out, under the district court's opinion, all five establishments, though clearly different, could be ineligible for the statutory exemption: Store A because it is financially successful, has recessed speakers, or has been solicited by a background music service; Store B and Store E because a chain or potential customer of a background music service; Store C because of physical size alone; and Store D because it uses speakers with hidden wires.

centive to embark on such a program and, we submit, could not resist such a temptation.

Moreover, as pointed out above (*supra*, p. 3), plaintiffs themselves, in urging the court of appeals to publish its opinion, recognized the "great significance [of this case] to all of the thousands of establishments in the nation which use radio broadcasts over loudspeakers, not just to the Gap."

II. Unless Reviewed by This Court, the Second Circuit's Opinion Is Effectively the Law of the Land.

The United States Court of Appeals for the Second Circuit is the first court of appeals to have spoken about Section 110(5) of the Copyright Act. It may also be the last to address questions concerning the application of the actual language of the statute, questions which so significantly affect retail merchants across the country. The Gap is one of the few retailers entitled to the Section 110(5) exemption which also has a sufficiently large economic stake in the availability of that exemption for it to be worthwhile for it to litigate against ASCAP, BMI (Broadcast Music, Inc.), or SESAC, Inc.

Specifically, The Gap, at the time that this litigation was instituted, owned approximately 420 small retail clothing stores across the nation; it now owns approximately 525 such stores. These stores are equipped with "a single receiving apparatus of a kind commonly used in private homes." Nevertheless, as a result of the decision in this case, The Gap will be required to pay substantial license fees.

Petitioner knows of no comparably situated chain of stores which could avail itself of the Section 110(5) exemption. Many stores are equipped with commercial-quality equipment, thus placing those stores outside the clear statutory language of Section 110(5). Many other multiple location stores are franchise operations, with no one franchisee having a sufficiently large economic interest to make it worthwhile to fight the music licensing organizations. Under the circumstances, it is economically unrealistic to expect any of the vast number of retail merchants whose stores might qualify for the Section 110(5) exemption (including all those with only a single location) to undertake the cost of doing battle with ASCAP or BMI. It is far easier for them simply to pay the tribute which these organizations, armed with the court of appeals' decision below, will undoubtedly demand.

Consequently, in the absence of any other likely litigants, it is highly improbable that this Court will again have an opportunity to review the scope of the Section 110(5) exemption or the improper use of legislative history made by both the court of appeals and district court below.*

---

* An action similar to this has been brought by BMI against the Casual Corner Stores, which are owned by the U.S. Shoe Corp. The decision in that action, *Broadcast Music, Inc.* v. *United States Shoe Corp.*, No. 79-1936 (C.D. Cal., Dec. 22, 1980), *appeal docketed*, No. 81-5162 (9th Cir., Feb. 10, 1981), which was won by BMI, has been appealed to the Court of Appeals for the Ninth Circuit. Because the district court held in the BMI action that the defendants were using commercial equipment in their stores rather than equipment of the kind commonly used in private homes, that appeal does not raise the same issues as were before the Second Circuit.

III. This Court Has Historically Concerned Itself With This Issue.

This Court has considered the relative rights of copyright owners and commercial establishments using music broadcast over the radio of such great importance that it has twice dealt with this balance. In 1931 this Court decided *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), and held that a hotel maintaining a master radio receiving set wired to loudspeakers or headphones in each of the hotel's public and private rooms was publicly "performing" music for profit and was therefore obligated to pay copyright royalties to the owners of the music. Forty-four years later, this Court decided *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151 (1975), and held that a commercial establishment was not "performing" music and therefore not infringing plaintiffs' copyrights when it received licensed radio broadcasts which it conveyed to its employees and customers by means of four speakers recessed in the ceiling. Because the Copyright Act of 1976 changed the statutory definition of "perform," 17 U.S.C. § 101, *Aiken* is no longer directly applicable. However, *Buck* and *Aiken* have survived as influences on both Congress and the Judiciary. *See, e.g.*, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 86-87 (1976); (7a-8a); (19a-21a).

There is, however, no currently valid pronouncement from this Court regarding the relative rights of copyright holders and commercial establishments receiving their music on the radio, and, as elaborated in Point II above, if this Court does not act now, it is unlikely that it will ever have the opportunity to speak to the actual language

of Section 110(5) in the future. An opinion of the United States Court of Appeals for the Second Circuit which is wholly at odds with the clear and unambiguous language of the Copyright Act will instead serve as the law of this nation.

IV. The Decision Below Is Erroneous.

Upon consideration of the language of the Copyright Act and the opinion of the Second Circuit, it is apparent that the court of appeals based its decision on criteria wholly unrelated to the terms of the statute it was purporting to construe.

Section 110(5) of the Copyright Act provides that:

> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
>
> (1) . . .
>
> (5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—
>
> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public;
>
> (6) . . .

By the terms of the statute, three questions should control the decision in a case involving Section 110(5):

(1) Is the establishment using a "single receiving apparatus of a kind commonly used in private homes"?

(2) Has a direct charge been made to see or hear the transmission?

(3) Has the transmission been "further transmitted to the public"?

The court of appeals below virtually ignored the language of the Copyright Act and the criteria established therein, and instead decided this case on the basis of portions of the Congressional Committee Reports accompanying the Act which are inconsistent both with these criteria and with other portions of the legislative history.*

The three-pronged test of Section 110(5) determines if a *use* of copyrighted material is exempt from copyright liability. All three prongs are directed at ascertaining *what* is being done and *how*. The court of appeals' reliance on the legislative history shifts the whole focus of the Section so as to determine liability on the basis of *who* is using the music. Thus, under the opinion below, a commercial establishment must pay copyright license fees if it is: (a) larger than the restaurant sued by members of ASCAP in *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151 (1975); or (b) "of sufficient size to justify, as a practical matter, a subscription to a commercial background music service." (8a.) The statutory criteria are simply disregarded.

* Certain portions of certain committee reports support the position taken by the courts below, just as other portions of the same reports support a contrary position. However, in light of the clear inconsistency with the language of the Act of the portions of the committee reports referred to by the district court, as well as the countervailing evidence found in other portions of the same reports, The Gap submits that the legislative history relied on by the courts below is inconclusive and should have been given no weight in this case. *See, e.g., United States* v. *Oregon*, 366 U.S. 643, 648 (1966).

In light of the actual statutory language, there is simply no principled basis for establishing copyright liability on the grounds set out in the legislative history cited to in the court of appeals' opinion. As indicated above, the test of Section 110(5) involves *what* is being done with the music and *how* it is being done. The "what" is playing a radio in public. The "how" is by means of home equipment without charging admission or further transmission. *Who* is doing the transmitting is irrelevant under the statutory test. By focusing on "what" is being done and "how," the extent of the statutory exemption is measured objectively, thereby avoiding the inevitable morass inherent in attempting to make judgments based on the size or character of the user.

The error in relying upon portions of the Congressional Committee Reports which deal with the type of commercial establishment exempted by Section 110(5) is highlighted by an analysis of the conclusion of the district court's opinion (21a):

> The court therefore concludes that The Gap is not the small* commercial establishment whose reception and performance of radio transmissions via commonly used stereo equipment Congress intended in section 110(5) to exempt from the category of copyright infringing uses.

* There is no definition of "small" in the committee reports. Does it mean small in terms of size of premises, number of customers, sales, profits or some other measure? The court of appeals has determined that "small" pertains to physical and economic size, but there is no basis for this conclusion in the statute. Moreover, basing copyright liability on a classification such as "small commercial establishment" or an establishment's ability to pay for background music would also raise equal protection issues involving the rationality of the classification; this constitutional issue is avoided by the statute's focus on the nature of the use rather than the nature of the user.

Thus, the district court apparently denied The Gap an exemption because it is a relatively successful retailer—the kind of retailer which purportedly should be obligated to pay for its use of music. But there is nothing whatsoever in the Act itself which even arguably suggests that an economically successful establishment is not entitled to the Section 110(5) exemption. Section 110(5) does not even refer to the nature of the exempted person playing a radio. That the radio is being played by The Gap rather than by a neighborhood shoe repair shop, a nationwide chain of shoe repair shops, or a department store is wholly irrelevant to the test set forth in the statute. To the extent that any of these varied establishments uses a single receiving apparatus of a kind commonly used in private homes, without charging admission or further transmitting, it is statutorily exempt. And, because the portions of the Congressional Committee Reports regarding "small commercial establishments" and "background music services" do not clarify the enacted language of Section 110(5) but instead set forth an entirely different criteria for liability, the courts below erred in relying upon them.

Moreover, viewing the legislative history of the Copyright Act as a whole, it is clear that Congress was aware that the Section 110(5) exemption was a technological one—focusing on *what* and *how* rather than on *who*. It is also clear that Congress was aware that, as technology advanced, this standard might allow commercial establishments beyond the size of the establishments which the Second Circuit would exempt to avail themselves of the Section 110(5) exemption. Congress chose, however, to

employ the broader, technological standard rather than one directed to economic considerations.

As early as 1964 the Copyright Revision Bill, which preceded the 1976 Act, referred to "a single receiving apparatus of a kind commonly used in private homes,"* and Congress was warned by counsel for BMI that "this is a scientific instead of an economic assumption . . . [i]n the future we may develop machinery which is used in theaters just the same way as in private homes, and to put that in the act seems to me to be running the risk of drawing a new juke box clause."**

In 1965, by which time the language in Section 109(7) of the Copyright Revision Bill being considered by Congress was virtually identical to that enacted in Section 110(5) in 1976, Albert F. Ciancimino, counsel for SESAC, Inc., reiterated the warning:

> . . . this exemption may, in due time, by virtue of certain advancements in technology and science create an anomaly in the future, analogous to the present anomaly which exists with regard to the jukebox exemption in our 1909 statute.
>
> Just as the present status of jukeboxes was not and possibly could not have been foreseen when the 1909 statute was enacted, the exemption in [Section 110(5)] of the bill presently under consideration may

* H.R. 11947, 88th Cong., 2d Sess. §13(2) (1964), House Comm. Print, 89th Cong., 1st Sess. 9, *Copyright Law Revision: Part 5—1964 Revision Bill With Discussions and Comments* (1965).

** House Comm. Print, 89th Cong., 1st Sess. 128, *Copyright Law Revision: Part 5—1964 Revision Bill With Discussion and Comments* (1965) (Comment of Sydney M. Kaye).

> in the future cause unforeseen and unanticipated hardship to the copyright owner.*

Indeed, at that time even counsel for ASCAP warned that:

> Although ASCAP does not charge for the performances in [public commercial places such as restaurants where home-type receiving sets are used], and does not contemplate charging for them, I think it is unwise to exempt such uses by statute. Who knows what new inventions will bring in the future? . . .
>
> This approach . . . could at some future date create the same inequitable situation that we now face in the exemption of coin-operated machines.**

Congress' response to these clearly articulated fears was not to amend the draft bill to eliminate the technological exemption it had created. Instead, Congress explained with respect to Section 110(5) that:

> The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the committee believes that the exemption should be made explicit in the statute. Some fears have been expressed that technical improvements in a 'single receiving apparatus of a kind commonly used in private homes' might someday lead to abuse of this exemption, but the committee does not feel that this

---

* *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcommittee No. 3 of House of Representatives Committee on the Judiciary*, 89th Cong., 1st Sess. 221-222 (1965) (Statement of Albert F. Ciancimino).

** *Id.* at 177 (Statement of Herman Finkelstein).

> remote possibility justifies making vast numbers of small business and professional people guilty of technical infringements.*

It is thus apparent that, recognizing the possibility of technological advances in the quality of home receiving equipment which might enable relatively large commercial establishments to use that equipment and avail themselves of the Section 110(5) exemption, Congress still chose to create what might be an extremely broad exemption rather than a narrow one. Most importantly, Congress was aware, as well, that it was creating an exemption aimed at the "scientific" question of the nature of the radio receiving equipment, and not an exemption aimed at the nature of the establishment using the equipment.

The court of appeals erred by failing to focus on the "scientific" exemption of Section 110(5)—the nature of the receiving equipment used in The Gap's Greenwich Village store and the use made of that equipment—and substituting in its stead standards nowhere to be found in the statute. And, unless this Court chooses to review this case, those non-statutory standards will effectively govern the obligations of merchants throughout the country to pay license fees to music licensing organizations.

---

* H.R. Rep. No. 2237, 89th Cong., 2d Sess. 77 (1966).

Conclusion

For the reasons stated above, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

ROBERT G. SUGARMAN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Attorney for Petitioner

LAUREN W. FIELD
WEIL, GOTSHAL & MANGES
Of Counsel

Appendix

Judgment of the United States Court of Appeals for the Second Circuit, Entered November 30, 1981

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of November one thousand nine hundred and eighty-one

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE WILLIAM H. TIMBERS,
HONORABLE THOMAS J. MESKILL,
Circuit Judges

81-7543

SAILOR MUSIC, WOW AND FLUTTER MUSIC, QUACKENBUSH MUSIC, LTD., WB MUSIC CORP., JOBETE MUSIC CO., INC., BLACK BULL MUSIC, INC., and GLADYS MUSIC,

Plaintiffs-Appellees,

v.

THE GAP STORES, INC.,

Defendant-Appellant.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Judgment of the Second Circuit

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. The Gap Stores, a chain of approximately 420 clothing shops, transmits radio music programs throughout its stores by means of radio receivers connected to loudspeakers recessed in the ceilings of its stores. One of its shops, located in New York City at 354 Sixth Avenue, has four speakers recessed behind wire grids in the store's ceiling. The size of this store is 2769 square feet. The average size of all Gap stores is 3500 square feet. On September 27, 1978, radio programs featuring appellees' copyrighted songs were played in two Gap stores in New York City.

2. 17 U.S.C. § 106(4) grants copyright owners the exclusive rights publicly to perform, or authorize the performance of, their copyrighted works. Section 110(5) exempts from § 106(4) any "communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of the kind commonly used in private homes, unless— . . . (B) the transmission thus received is further transmitted to the public; . . ."

3. In enacting § 110(5) Congress expressly considered the scope of the exemption this section provided. The House Committee sponsoring the 1976 Copy-

right Act made reference to *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151 (1975), a case holding that a fast-food shop of 1055 square feet with a commercial area open to the public of 620 in which radio programs were played by means of a radio receiver connected to four speakers in the shop's ceiling was exempt pursuant to the 1909 copyright laws. The Committee noted that this particular fact situation represented the "outer limit" of the § 110(5) exemption. H. Rep. No. 1476, 94th Cong., 2d Sess., 87 (1976).

4. The Gap store in the instant case exceeds this "outer limit" as Judge Gagliardi properly held. It is much larger than the shop in *Aiken* which, as Judge Gagliardi concluded, indicates that Congress did not intend it to be exempted from the mandates of the copyright laws pursuant to § 110(5). Furthermore, the store is "of sufficient size to justify, as a practical matter, a subscription to a commercial background music service," H. Rep. No. 1733, 94th Cong., 2d Sess., 75 (1976), a factor which further suggests Congress did not intend that the Gap store would be exempt. *See* Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act*, 22 N.Y.L.S. L. Rev. 521, 528-34 (1977). Accordingly, Judge Gagliardi correctly determined that the Gap Stores had made infringing use of appellees' copyrighted works.

5. The Gap Stores claims that the injunction prohibiting it from "rendering any public performances by means of radio broadcasts over loudspeakers which would infringe plaintiff's copyrighted musical compositions" is vague. Indeed, an injunction must not be so vague that it is confusing. *Inter-*

national Longshoremen's Ass'n v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 74-76 (1967). We believe the injunction is sufficiently clear to notify Gap Stores that broadcasting radio programs as it does now is forbidden. Thus, the injunction fulfills the requirement of Federal Rules of Civil Procedure Rule 65(d) that an injunction must be specific in terms to give the party subjected to the injunction fair notice of the forbidden conduct.

/s/ IRVING R. KAUFMAN

IRVING R. KAUFMAN

/s/ WILLIAM H. TIMBERS

WILLIAM H. TIMBERS

/s/ THOMAS J. MESKILL

THOMAS J. MESKILL

Circuit Judges.

Opinion of the United States Court of Appeals for the Second Circuit, Filed December 15, 1981

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 394 August Term, 1981

(Argued November 24, 1981 Decided November 30, 1981

Opinion filed December 15, 1981)

Docket No. 81-7543

SAILOR MUSIC, WOW AND FLUTTER MUSIC, QUACKENBUSH MUSIC, LTD., WB MUSIC CORP., JOBETE MUSIC CO., INC., BLACK BULL MUSIC, INC., and GLADYS MUSIC,

Plaintiffs-Appellees,

v.

THE GAP STORES, INC.,

Defendant-Appellant.

Before:

KAUFMAN, TIMBERS, and MESKILL, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Southern District of New York, Lee P. Gagliardi, *Judge,* holding The Gap Stores, Inc. liable for copyright infringement.

Affirmed.

Robert G. Sugarman, New York, N.Y. (Amy L. Katz, Weil, Gotshal & Manges, New York, N.Y., *of Counsel*), *for Appellant.*

Jay Topkis, New York, N.Y. (Judith M. Saffer, I. Fred Koenigsberg, Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y., Bernard Korman, New York, N.Y., *of Counsel*), *for Appellee.*

Theodore S. Steingut, Berger, Steingut, Weiner, Fox & Stern, New York, N.Y., *of Counsel, for Amicus Curiae National Retail Merchants Association.*

PER CURIAM:

This is an appeal from a judgment entered upon the order of Judge Lee P. Gagliardi granting the motion for summary judgment of Sailor Music, Wow and Flutter Music, Quackenbush Music Ltd., WB Music Corporation, Jobete Music Company, Inc., Black Bull Music, Inc., and Gladys Music and finding that The Gap Stores, Inc. had made infringing use of the music companies' copyrighted works. Since we agree that The Gap Stores, Inc. does not come within the ambit of the exemption provided by 17 U.S.C. § 110(5),[1] we affirm.

1. 17 U.S.C. § 110 provides in pertinent part:

> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
>
> . . .
>
> (5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—
>
> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public; . . .

The Gap Stores, a chain of approximately 420 clothing shops, transmits radio music programs throughout its stores by means of radio receivers connected to loudspeakers recessed in the ceilings of its stores. One of its shops, located in New York City at 354 Sixth Avenue, has four speakers recessed behind wire grids in the store's ceiling. The size of this store is 2769 square feet. The average size of all Gap stores is 3500 square feet. On September 27, 1978, radio programs featuring appellees' copyrighted songs were played in two Gap stores in New York City.

17 U.S.C. § 106(4)[2] grants copyright owners the exclusive rights publicly to perform, or authorize the performance of, their copyrighted works. Section 110(5) exempts from § 106(4) any "communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of the kind commonly used in private homes, unless— . . . (B) the transmission thus received is further transmitted to the public; . . ."

In enacting § 110(5) Congress expressly considered the scope of the exemption this section provided. The House Committee sponsoring the 1976 Copyright Act made reference to *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151 (1975), a case holding that a fast-food shop of

2. 17 U.S.C. § 106 provides in pertinent part:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> . . .
>
> (4) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; . . .

1055 square feet with a commercial area open to the public of 620 square feet in which radio programs were played by means of a radio receiver connected to four speakers in the shop's ceiling was exempt pursuant to the 1909 copyright laws. The Committee noted that this particular fact situation represented the "outer limit" of the § 110(5) exemption. H. Rep. No. 1476, 94th Cong., 2d Sess., 87 (1976).

The Gap store in the instant case exceeds this "outer limit" as Judge Gagliardi properly held. It is much larger than the shop in *Aiken* which, as Judge Gagliardi concluded, indicates that Congress did not intend it to be exempted from the mandates of the copyright laws pursuant to § 110(5). Furthermore, the store is "of sufficient size to justify, as a practical matter, a subscription to a commercial background music service," H. Rep. No. 1733, 94th Cong., 2d Sess., 75 (1976), a factor which further suggests Congress did not intend that the Gap store would be exempt. *See* Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act,* 22 N.Y.L.S. L. Rev. 521, 528-34 (1977). Accordingly, we conclude Judge Gagliardi correctly determined that The Gap Stores had made infringing use of appellees' copyrighted works.

Moreover, the Gap Stores claims that the injunction prohibiting it from "rendering any public performances by means of radio broadcasts over loudspeakers which would infringe plaintiff's copyrighted musical compositions" is vague. Indeed, an injunction must not be so vague that it is confusing. *International Longshoremen's Ass'n* v. *Philadelphia Marine Trade Ass'n,* 389 U.S. 64,

74-76 (1967). We believe the injunction is sufficiently clear to notify Gap Stores that broadcasting radio programs as it does now is forbidden. Thus, the injunction fulfills the requirement of Federal Rules of Civil Procedure Rule 65(d) that an injunction must be specific in terms to give the party subjected to the injunction fair notice of the forbidden conduct.

Accordingly, we affirm.

Errata Page

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES COURTHOUSE
Foley Square
New York 10007

A. DANIEL FUSARO
Clerk

Sailor Music v. The Gap Stores, Inc.

Docket No. 81-7543

August Term, 1981

Opinion filed December 15, 1981

Page 452, line 1—delete "(Judith M. Saffer" and insert "Bernard Korman, Judith M. Saffer" in place thereof.

Page 452, line 24—delete "bymeans" and insert "by means" in place thereof.

Page 454, line 7—delete "*Copyright Act;* 22 N.Y.L.S.L. Rev." and insert "*Copyright Act,* 22 N.Y.L.S. L. Rev." in place thereof.

Page 454, line 11—delete "the Gap" and insert "The Gap" in place thereof.

A. DANIEL FUSARO, Clerk

ADF/hjd

Judgment of the United States District Court for the Southern District of New York, Entered June 26, 1981

79 Civ. 59 (LPG)

SAILOR MUSIC, *et al.*,

Plaintiffs,

against

THE GAP STORES, INC.,

Defendant.

Cross-motions for summary judgment pursuant to Rule 56, Fed. R. Civ. P. having been decided by the Court's Memorandum Decision and Order dated February 3, 1981, granting plaintiffs' motion, and denying defendant's motion, it is hereby

ORDERED, ADJUDGED AND DECREED that The Gap Stores, Inc., its officers, agents, servants and employees and all persons in active concert or participation with them, and each of them, are restrained and enjoined from rendering any public performances by means of radio broadcasts over loudspeakers which would infringe plaintiffs' copyrighted musical composition; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that no statutory damages are being awarded to plaintiffs at this time, nor has the Court considered whether costs or attorneys fees should be awarded, because the parties and the Ameri-

can Society of Composers, Authors and Publishers have entered into an agreement governing their past, present and future dealings pending the determination of the defendant's planned appeal. A copy of said agreement is annexed hereto. In the event of the failure of any party to the aforesaid agreement to comply with the terms of said agreement, an application may be made herein for such relief as may be just and proper.

Dated: June 25, 1981.
New York, New York

/s/ LEE P. GAGLIARDI
U.S.D.J.

/s/ R.C.

Judgment Entered 6/26/81

/s/ RAYMOND F. BURGHARDT
Clerk

Letter Dated May 11, 1981 Annexed to Judgment

[LETTERHEAD OF]

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
ASCAP Building—One Lincoln Plaza
New York, N.Y. 10023
Area Code (212) 595-3050

Bernard Korman
General Counsel

May 11, 1981

Robert G. Sugarman, Esq.
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153

Re: Sailor Music, et al. v.
The Gap Stores, Inc.
(No. 79 Civ. 0059 S.D.N.Y.)

Dear Mr. Sugarman:

This letter sets forth our agreement in connection with the Judgment to be entered in the above action and past and future nondramatic public performances by The Gap Stores, Inc. ("The Gap") of all copyrighted musical compositions in the ASCAP repertory.

All claims by ASCAP and its members against The Gap for such performances shall be resolved as follows:

(1) Defendant shall within thirty (30) days establish an escrow account for the deposit of a sum of money equal to the amount of blanket license fees it would be obligated

to pay to ASCAP under its standard form of license agreement offered to establishments such as The Gap, were it licensed. A copy of ASCAP's current form of such agreement is attached as Exhibit A. The first such payment shall cover the period commencing January 1, 1979 and ending June 30, 1981, with subsequent payments to be made quarterly in advance.

(2) The escrow account shall be maintained by Robert G. Sugarman and Jay Topkis as escrow agents and, pursuant to an appropriate escrow agreement, the escrow funds shall be placed in an account with the Morgan Guaranty Trust Company or such other bank as the escrow agents may designate in the future, and shall be invested in Certificates of Deposit, U.S. Treasury Bills or Notes, or similar investment securities.

(3) Should plaintiffs ultimately prevail, all funds in the escrow account including interest thereon shall be disbursed to ASCAP promptly after entry of a final order and the time to appeal therefrom or seek review thereof has run. In that event, should The Gap thereafter continue to perform publicly copyrighted musical compositions in the ASCAP repertory, The Gap shall thereupon enter into a license agreement with ASCAP.

(4) Should The Gap ultimately prevail, all funds in the escrow account including interest thereon shall be disbursed to The Gap promptly after entry of a final order

and the time to appeal therefrom or seek review thereof has run.

Please confirm that this letter sets forth our agreement by countersigning the enclosed copy and returning it to me.

Sincerely,

/s/ BERNARD KORMAN

Bernard Korman

AGREED:

WEIL, GOTSHAL & MANGES

By /s/ ROBERT G. SUGARMAN

Robert G. Sugarman

Opinion of the United States District Court for the Southern District of New York, Dated February 3, 1981

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

79 Civ. 0059

SAILOR MUSIC, WOW AND FLUTTER MUSIC, QUACKENBUSH MUSIC, LTD., WB MUSIC CORP., JOBETTE MUSIC CO., INC., BLACK BULL MUSIC, INC. and GLADYS MUSIC,

Plaintiffs,

against

THE GAP STORES, INC.,

Defendant.

GAGLIARDI, D.J.

Plaintiffs in this copyright infringement action are seven copyright owners and members of the American Society of Composers, Artists and Performers ("ASCAP"), seeking monetary damages and injunctive relief against defendant The Gap Stores, Inc. ("The Gap") for the transmission via stereo apparatus in Gap stores of plaintiffs' copyrighted compositions. This action arises under the federal copyright laws, 17 U.S.C. §101 *et seq.* Pending before the court are the parties' cross-motions for summary judgment pursuant to Rule 56, Fed. R. Civ. P.

Opinion of the District Court

Statement of Facts

The relevant facts may be briefly stated. The Gap is a well-known chain of approximately 420 clothing stores with 1979 revenues of nearly $300 million. It is The Gap's policy to transmit for the enjoyment of its customers radio programs by means of radio receivers connected to recessed loudspeakers arranged so that the music is audible throughout the stores. The allegedly infringing acts at issue here occurred on September 27, 1978, at two Gap stores located in New York City at 354 Sixth Avenue and at 22 West 34th Street. Defendant does not deny that on that date radio programs featuring plaintiffs' copyrighted songs were played at those locations. In each of the stores the speakers are recessed behind wire grids in the store's ceiling and are connected to the receiver by built-in wiring. There are four speakers at the Sixth Avenue store and seven speakers at the 34th Street store. The size of the Sixth Avenue store is 2769 square feet; the size of the 34th Street store is 6770 square feet, with a selling area open to the public of 4,690 feet. The average size of all Gap stores is 3500 square feet.

Discussion

17 U.S.C. §106(4) grants copyright owners the exclusive rights publicly to perform, or authorize the performance of, their copyrighted works. 17 U.S.C. §101 broadly defines "perform" to include the rendition or playing of a work "either directly or by means of any device or process." Pursuant to those provisions of the copyright

laws, plaintiffs, through ASCAP, receive licensing fees from radio stations for the performance of their copyrighted works. ASCAP now claims that the further transmission or performance of its members' copyrighted works via radio receivers in The Gap's retail stores constitutes copyright infringement. The Gap argues that its use is protected by 17 U.S.C. §110(5) which exempts from the coverage of Section 106(4) any

> communication of a transmission [*e.g.*, a radio or television broadcast] embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—
>
> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public.

The issue in this lawsuit is whether defendant's allegedly infringing use of plaintiffs' copyrighted songs is exempted by section 110(5). To be exempted, The Gap must satisfy three requirements: (1) its apparatus must be "of a kind commonly used in private homes;" (2) no direct charge may be made to listen to the performances; and (3) the transmissions once received may not be "further transmitted to the public." Plaintiffs do not contend that The Gap directly charges its customers for listening to the performances; the court's inquiry therefore focuses on the first and third requirements. The reach of these provisions of section 110(5) has scarcely been tested in the courts. The legislative history, though, enables the

court to ascertain what Congress intended by exempting performances via "commonly used" stereo equipment unless "further transmitted to the public."

Prior to the enactment in 1976 of the new copyright laws, the Supreme Court in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), exempted under the 1909 copyright laws the owner of a fast-food store in Pittsburgh who kept a radio receiver with four speakers in the ceiling turned on throughout the business day. The size of the restaurant in the *Aiken* case was 1055 square feet, with a commercial area open to the public of 620 square feet. The House Committee sponsoring the 1976 Copyright Act expressly considered the *Aiken* decision, stating that the basis of the decision "is completely overturned by the present bill and its broad definition of 'perform' in section 101." H. Rep. No. 94-1476, 94th Cong., 2d Sess., 87 (1976). The Committee proceeded to explain (and, due to its importance, this portion of the House Report is quoted at length):

> Under the particular fact situation in the *Aiken* case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5). However, the Committee considers this fact situation to represent the outer limit of the exemption, and believes that the line should be drawn at that point. Thus, the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose

> liability where the proprietor has a commercial "sound system" installed or converts a standard home receiving apparatus (by agumenting [sic] it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system. Factors to consider in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance for individual members of the public using those areas.

Applying this standard to the instant case, it is clear that Congress did not intend to exempt establishments such as The Gap. First, The Gap stores, with an average size of 3500 square feet, are substantially larger than the public area of 620 square feet in the fast-food store at issue in *Aiken*. By virtue of the size of The Gap stores, the radio transmissions received on the radio receivers and played via the recessed loudspeakers are "further transmitted to the public." In addition, the stereo apparatus used by the specified Gap stores, including built-in wiring and four or seven loudspeakers recessed in ceiling cavities, may be considered to be "standard home receiving apparatus [converted] (by augmenting it with sophisticated or extensive amplification equipment) into the equivlent of a commercial sound system." H. Rep., *supra*, at 87. There is a factual dispute between the parties' experts as to whether or not the particular components used in these two Gap stores are actually "commonly used in private homes," and consequently the court cannot grant summary

judgment on this basis. Nevertheless, the rather elaborate sound system developed by The Gap, in conjunction with the size of the stores, places The Gap beyond the section 110(5) exemption.

This conclusion is further supported by the following statement in the Conference Report:

> It is the intent of the conferees that a small commercial establishment of the type involved in *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151 (1975), which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt.

H. Rep. No. 94-1733, 94th Cong., 2d Sess., 75 (1976). It is clear on the basis of the uncontroverted affidavits of background music suppliers submitted by plaintiffs that The Gap is "of sufficient size to justify, as a practical matter, a subscription to a commercial background music service."

The court therefore concludes that The Gap is not the small commercial establishment whose reception and performance of radio transmissions via commonly used stereo equipment Congress intended in section 110(5) to exempt from the category of copyright infringing uses. Plaintiffs' motion for summary judgment is granted. Defendant's motion for summary judgment is denied.

Defendant's infringing use of plaintiff's copyrighted works is hereby enjoined. Submit judgment.

So Ordered.

LEE P. GAGLIARDI

U.S.D.J.

Dated: New York, New York
February 3, 1981.

Opposition

Supreme Court, U.S.
FILED
MAR 31 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1633

IN THE

Supreme Court of the United States

October Term, 1981

THE GAP STORES, INC.,

Petitioner,

v.

SAILOR MUSIC, WOW AND FLUTTER MUSIC, QUACKENBUSH MUSIC, LTD., WB MUSIC CORP., JOBETE MUSIC CO., INC., BLACK BULL MUSIC, INC., and GLADYS MUSIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS SAILOR MUSIC, et al., IN OPPOSITION

JAY TOPKIS
345 Park Avenue
New York, New York 10154
(212) 644-8000

BERNARD KORMAN
One Lincoln Plaza
New York, New York 10023
(212) 870-7510

Attorneys for Respondents Sailor Music, et al.

ALLAN BLUMSTEIN
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
JUDITH M. SAFFER
I. FRED KOENIGSBERG
Of Counsel

QUESTION PRESENTED

Whether the Court of Appeals erred in determining that the particular factual circumstances of petitioner's unlicensed performances of copyrighted music exceeded the "outer limit" of the statutory exemption provided by 17 U.S.C. § 110(5) and constituted copyright infringement?

TABLE OF CONTENTS

PAGE

Question Presented i

Statement Of The Case 1
- The Parties 2
  - The Gap 2
  - Plaintiffs 3
- Prior Proceedings 3
  - The District Court 3
  - The Court of Appeals 7

Reason For Denying The Writ 7
- The Factual Holding of the Courts Below Presents No Question of General Importance Warranting Review By This Court 7

Conclusion 10

TABLE OF AUTHORITIES

CASES:

American Jewish Congress v. *Kreps*, 574 F.2d 624 (D.C. Cir. 1978) 8

Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) 3, 9

Buck v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) 9

League to Save Lake Tahoe, Inc. v. *Trounday*, 598 F.2d 1164 (9th Cir. 1979) 8

Twentieth Century Music Corp. v. *Aiken*, 422 U.S. 151 (1975) 4, 9

United States v. *ASCAP*, [1950-1951] Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950) 9

STATUTES:

17 U.S.C. § 110(5) ..... *passim*

LEGISLATIVE MATERIALS:

H. Rep. No. 94-1476, 94th Cong., 2d Sess., 87 (1976) 4

H. Rep. No. 94-1733, 94th Cong., 2d Sess., 75 (1976) 6

IN THE

Supreme Court of the United States

October Term, 1981

No. 81-1633

THE GAP STORES, INC.,
Petitioner,

v.

SAILOR MUSIC, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS SAILOR MUSIC, et al., IN OPPOSITION

STATEMENT OF THE CASE

The Court of Appeals decided a narrow question in this case: was Petitioner ("The Gap") entitled to an exemption from copyright infringement liability under 17 U.S.C. § 110(5), in light of the particular factual circumstances of its performance of copyrighted music over a radio-over-loudspeaker system in its retail stores?* The Court answered "no"—The Gap's performances were infringements of copyright (5a-9a).**

---

* The pertinent portion of 17 U.S.C. § 110(5) is quoted at p.3 of the petition.

** References are to the appendix to the petition for a writ of certiorari.

The Parties

The Gap

The Gap owns a national chain of approximately 420 retail clothing stores. As a matter of company policy, The Gap performs music throughout the day in each of its stores, for the enjoyment of its customers. The music is provided by a system consisting of a radio receiver connected by built-in wiring to loudspeakers located in ceiling recesses. The loudspeakers—some as far as 130 feet from the receiver—are carefully arranged so that the music is audible throughout the store.* Each store's receiver is tuned to a local radio station which specializes in all-music programming. The system is turned on at each store at the beginning of each business day and remains on until the store closes. The sound level is periodically monitored to assure that the music is audible and neither too loud nor too soft.

These radio and speaker installations are carefully planned, not improvised. The speaker locations, ceiling recesses and built-in wiring are part of The Gap's standard architectural and electrical plans used in constructing each store. Each store has from four to eight ceiling speakers.

The alleged infringing performances occurred on September 27, 1978 at two New York City stores. One store, located at 354 Sixth Avenue, has four loudspeakers and is 2769 square feet large. The other, located at 22 West 34th Street, has seven loudspeakers and a total area of 6770 square feet, with a public selling area of 4690 square feet. The average size of all Gap stores is 3500 square feet.

---

* The receiver has no loudspeaker itself and is useless without connection to one or more external loudspeakers.

Plaintiffs

Plaintiffs are the copyright proprietors of musical compositions performed by The Gap on September 7, 1978.* Plaintiffs are also members of the American Society of Composers, Authors and Publishers ("ASCAP"). ASCAP is an unincorporated association of writers and publishers of music; it acts as a clearing house for the licensing, on a nonexclusive basis, of nondramatic performing rights in its members' copyrighted music. This Court's opinion in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), contains a description of ASCAP and its activities.

ASCAP makes licenses available to all music users, including business establishments like The Gap which perform music by means of a radio-over-loudspeaker system.** In 1978, after the effective date of the 1976 Copyright Act, ASCAP offered The Gap its standard form of license agreement. The license fee quoted was only $90 annually for each store. The Gap refused the license, and continued to perform copyrighted music without permission from either ASCAP or any copyright proprietor.

This copyright infringement action followed. The Gap defended on the ground that its performances were exempt from liability under 17 U.S.C. § 110(5).

Prior Proceedings

The District Court

Both sides moved for summary judgment. The District Court (Gagliardi, J.) recognized that it faced the narrow

---

* In accordance with Rule 28.1 of this Court's Rules, Respondents provide this listing; Warner Communications, Inc. is the parent company of WB Music Corp.; Motown Records Corp. is the parent company of Jobete Music Co., Inc.

** ASCAP's licenses to radio stations, by their express terms, authorize only the broadcaster's performances and do not extend to further public performances such as those at issue here.

issue of determining the *factual* limits of the section 110(5) exemption.

Under the statute's language, and in the factual circumstances before it, the District Court found that The Gap had to satisfy two requirements to be exempt from liability:

> "... [1] its apparatus must be of a kind commonly used in private homes. . .
>
> [2] the transmissions once received may not be 'further transmitted to the public.'" (18a)

Recognizing that "the reach of these provisions of section 110(5) has scarcely been tested in the courts," the District Court turned to the legislative history "to ascertain what Congress intended by exempting performances via 'commonly used' stereo equipment unless 'further transmitted to the public'" (19a).

That legislative history removed the remotest doubt as to The Gap's liability. The report of the House Committee sponsoring the 1976 Copyright Act was decisive.*

The House Committee first took note of this Court's decision in *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151 (1975). *Aiken* had exempted from liability under the 1909 Copyright Act a fast food shop which used a radio-over-loudspeaker system. The *Aiken* majority concluded that such uses were not "performances" under the old law. The *Aiken* shop used four closely-spaced loudspeakers and was very small—1055 square feet overall, with a public area of only 620 square feet.

The House Committee pointed out that the basis of the *Aiken* decision—its interpretation of what constituted a "performance" under the 1909 Act—was being "completely overturned by the present bill and its broad definition of 'performance' in section 101."

---

* H. Rep. No. 94-1476, 94th Cong., 2d Sess., 87 (1976).

The Committee report then proceeded to explain the limited exemption which was nonetheless being provided by section 110(5) for *Aiken*-type establishments. The *Aiken* factual situation was to be the "outer limit of the exemption":

> "Under the particular fact situation in the *Aiken* case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5). *However, the Committee considers this fact situation to represent the outer limit of the exemption, and believes that the line should be drawn at that point.* Thus, the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial "sound system" installed or converts a standard home receiving apparatus (by agumenting [sic] it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system. Factors to consider in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance for individual members of the public using those areas." (Emphasis added)

On the basis of this unambiguous legislative history, the District Court had no difficulty concluding that The Gap's performances, as a factual matter, exceeded the

limits of the section 110(5) exemption. Thus, the court found that:

1) The Gap's stores were substantially larger in size than the *Aiken* store. By virtue of that size, the radio transmissions received and relayed to the distant recessed loudspeakers were "further transmitted to the public" (20a);

2) The apparatus used by The Gap's stores, including built-in wiring and loudspeakers located in recessed ceiling cavities, "may be considered to be 'standard home receiving apparatus [converted] (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system.'" (20a)

The District Court concluded:

> ". . . the rather elaborate sound system developed by The Gap, in conjunction with the size of the stores, places The Gap beyond the section 110(5) exemption." (21a)

The District Court also found that the Conference Committee Report was decisive. It, too, fixed the limit of the exemption in terms of the *Aiken* shop's size:

> "It is the intent of the conferees that a small commercial establishment of the type involved in *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151 (1976), which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt."*

The court found that uncontroverted affidavits in the record conclusively demonstrated that The Gap's stores *were* "of sufficient size to justify, as a practical matter, a

---

* 21a, citing H. Rep. No. 94-1733, 94th Cong., 2d Sess., 75 (1976).

subscription to a commercial background music service" (21a).

The Court of Appeals

The Court of Appeals affirmed in a per curiam opinion (Kaufman, Timbers and Meskill, JJ.). They, too, cited the House and Conference Reports (7a-8a), and found the Gap's liability clear.

> "The Gap store in the instant case exceeds this 'outer limit' as Judge Gagliardi properly held. It is much larger than the shop in *Aiken* which, as Judge Gagliardi concluded, indicates that Congress did not intend it to be exempted from the mandates of the copyright laws pursuant to § 110(5). Furthermore, the store is 'of sufficient size to justify, as a practical matter, a subscription to a commercial background music service,' H. Rep. No. 1733, 94th Cong., 2d Sess. 75 (1976), a factor which further suggests Congress did not intend that the Gap store would be exempt. *See* Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act;* 22 N.Y.L.S.L. Rev. 521, 528-34 (1977). Accordingly, we conclude Judge Gagliardi correctly determined that The Gap Stores had made infringing use of appellees' copyrighted works." (8a)

REASON FOR DENYING THE WRIT

The Factual Holding of the Courts Below Presents No Question of General Importance Warranting Review By This Court

The courts below did not decide an important question of federal law that requires further review. They held only that on the record before them, The Gap's activities exceeded the "outer limit" of the Section 110(5) exemption, and The Gap was therefore an infringer.

Given the clarity with which Congress expressed its intention as to what that "outer limit" should be, the decisions below involved only a factual determination which does no mischief and creates no turmoil. Neither the District Court nor the Court of Appeals decided a novel, general or important legal issue in a manner which requires review by this Court.

Petitioner argues, however, that the decisions below should be reviewed because they went beyond the language of 17 U.S.C. § 110(5), and looked at legislative history, which is "inconsistent" with the statutory language.

The argument is without merit. The Gap has failed to demonstrate any inconsistency between the statutory language and the legislative history.* And surely the courts below did nothing extraordinary in looking at the legislative history of a new statute not previously examined.** It would have been extraordinary if the courts below had failed to look at legislative history, especially when legislative history was so clear in demonstrating petitioner's liability for copyright infringement given the facts of this case.

---

* Petitioner proposes that this Court should substitute some "scientific" standard for Congress' clear standard based on the *Aiken* fact situation. We respectfully suggest that this proposal should have been made to Congress when the new law was considered, not to this Court now.

** There is special justification for considering the Conference Committee report, which represents the consensus of the entire Congress. Such reports are given great weight:

> "Since the conclusions in the conference report were commended to the entire Congress, they carry greater weight than other of the legislative history." *American Jewish Congress* v. *Kreps*, 574 F.2d 624 at 629, n.36 (D.C. Cir. 1978).
>
> ". . . the expressed understanding of the Conference Committee, commended to the full Congress in the Conference Report and subsequently adopted, is not lightly to be disregarded, particularly where, as here, that understanding is supported by other evidence as well." *League to Save Lake Tahoe, Inc.* v. *Trounday*, 598 F.2d 1164 at 1172 (9th Cir. 1979).

The Gap argues that this Court has "historically" concerned itself with the issue presented by this case, citing *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) and *Aiken*. That is not so—the issue in *Jewell-LaSalle* and *Aiken* was whether radio-over-speaker use was a "performance" under the 1909 Act. That issue is not presented here, for Congress has expressly decided that radio-over-speaker use *is* a performance under the 1976 Act.*

Finally, The Gap argues that this Court should grant the petition because smaller retailers, who might qualify for the section 110(5) exemption, will not have the means to challenge ASCAP. But this argument is premised on unfounded and impermissible speculation. There is nothing to show that ASCAP will even attempt to license exempt establishments.** And any business establishments that might be affected by alleged "overreaching" by ASCAP have ample resources to protect themselves. For example, the National Retail Merchants Association, a voluntary trade association with some 3500 members, filed an *amicus* brief in the Court of Appeals in this case.

The Gap would have this Court engage in the dubious enterprise of granting the petition and then rendering some sort of advisory opinion as to the myriad of circumstances under which the section 110(5) exemption might or

---

* This Court has recognized that the 1976 Copyright Act was intended to strengthen copyright owners' control over public performances:

> "[N]othing in the Copyright Act of 1976 indicates in the slightest that Congress intended to weaken the rights of copyright owners to control the public performance of musical compositions. Quite the contrary is true." *BMI* v. *CBS*, 441 U.S. 1, 18-19 (1979) .

** As this Court has recognized, ASCAP's operations are carefully scrutinized by the Federal Executive and Judiciary, *BMI* v. *CBS*, 441 U.S. 1, 13 (1979). Those operations are governed by an Amended Final Judgment entered in 1950 in *United States* v. *ASCAP*, [1950-1951] Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

might not apply. We respectfully suggest that the Court should not embark on that sort of expedition. The question here is simply whether, on this record, The Gap is liable. The answer, as both courts below unanimously found, is yes.

CONCLUSION

The petition for a writ of certiorari should be denied.

New York, New York
March 31, 1982

Respectfully submitted,

JAY TOPKIS
345 Park Avenue
New York, New York 10154
(212) 644-8000

BERNARD KORMAN
One Lincoln Plaza
New York, New York 10023
(212) 870-7510

Attorneys for Respondents
Sailor Music, et al.

ALLAN BLUMSTEIN
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
JUDITH M. SAFFER
I. FRED KOENIGSBERG

Of Counsel